IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DAVID WAYNE BULLOCK,
Petitioner.

No. 2 CA-CR 2018-0249-PR
Filed December 12, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20150306001
The Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF DENIED

David Bullock, St. Johns
In Propria Persona

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Vásquez and Judge Eppich concurred.

E S P I N O S A, Judge:

¶1 Petitioner David Bullock seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the trial court's ruling absent a clear abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Bullock has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Bullock was convicted of aggravated taking the identity of another, and the trial court imposed a 4.5-year prison term. Bullock sought post-conviction relief, and counsel filed a notice pursuant to *Montgomery v. Sheldon*, 181 Ariz. 256 (1995), stating she had found no "viable" claim to raise. In a pro se supplemental petition, however, Bullock argued he was actually innocent and his trial counsel had been ineffective in failing to adequately investigate or advise him of possible defenses. The trial court summarily denied relief, addressing each of Bullock's claims, and this court denied relief on review. *State v. Bullock*, No. 2 CA-CR 2017-0002-PR (Ariz. App. Apr. 12, 2017) (mem. decision).

¶3 Bullock thereafter filed a second notice of post-conviction relief, and counsel again filed a notice pursuant to *Montgomery*. In another pro se, supplemental petition, however, Bullock argued he had received ineffective assistance of counsel in his first Rule 32 proceeding, asserting that his constitutional right to appellate review had been violated by counsel's use of the *Montgomery* notice. And he maintained that his claims of actual innocence and newly discovered evidence would have succeeded had they been properly raised by counsel. He further contended the court was required to review the record pursuant to *Anders v. California*, 386 U.S. 738 (1967). The trial court summarily denied relief.

¶4 On review, Bullock argues the trial court erred in denying him relief without a hearing. He again argues that had counsel in his first proceeding not filed a *Montgomery* notice, but had instead argued his claim of newly discovered evidence and actual innocence, he would have received relief. But, as the trial court noted, filing a *Montgomery* notice is

not, in and of itself, a recognized basis for finding counsel was ineffective. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to be ineffective, counsel's performance must fall below objectively reasonable standards).

¶5 Bullock further argues, however, that because counsel filed a *Montgomery* notice, he was "severely prejudiced by the resources afforded an attorney that an incarcerated individual does not have," including a law library. But such a claim is not cognizable under Rule 32 because it does not implicate his conviction or sentence but rather concerns only the alleged post-trial denial of his rights. *See* Ariz. R. Crim. P. 32.1. And the trial court correctly noted that an attorney will not be forced to raise an issue that he or she finds meritless. *Cf. Anders*, 386 U.S. at 744 ("[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw."). Rather, pursuant to *Montgomery*, a petitioner may raise such claims in a pro se supplemental petition, as happened here. 181 Ariz. at 260.

¶6 We agree with the trial court that Bullock's pro se petition also fails to state a colorable claim of ineffective assistance. "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006); *see also Strickland*, 466 U.S. at 687. To show prejudice, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶7 Bullock contends that, instead of filing a *Montgomery* brief, counsel should have presented evidence of his innocence. He states that he "now possesses a recorded interview of Cynthia Akason," the wife of the man Bullock alleges allowed him to use another person's contractor number. But Bullock's claim that such permission would establish his innocence was raised and rejected in his first proceeding, and it is therefore precluded. Furthermore, to the extent his claim could fall within an exception to preclusion as being based on newly discovered evidence, and even had he provided the evidence he claims is newly discovered with his petition, the claim is barred by res judicata, having been ruled upon on the merits in the previous proceeding. *See State v. Little*, 87 Ariz. 295, 304 (1960) (doctrine of res judicata generally applies in criminal cases).

¶8 Although we grant the petition for review, relief is denied.